No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

BART B. CHAMBERLAIN, JR., et al.,

Petitioners

versus

ALBERT BARNES ZINK, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Bart B. Chamberlain, Jr., et. al.,
Petitioners

vs.

Albert Barnes Zink, as Trustee for Sterling Oil of Oklahoma, Inc., et. al.,
Respondents

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1966
No. _____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bart B. Chamberlain, Jr. (Chamberlain), G. H. Jett (Jett), Howard M. Pack (Pack), Joseph Kahn (Kahn) and Geo. H. Jett Drilling Co., Inc., a Delaware corporation (Jett Drilling), your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (Court of Appeals), entered in the above-styled cause on June 26, 1966.

OPINION BELOW

The opinion of the Court of Appeals (App. A, **infra**, pages 15-28 is reported at 362 F.2d 723.

JURISDICTION

The judgment of the court below (App. A, **infra**, page 27) was entered on June 26, 1966. A timely petition for rehearing was filed and an order was entered on July 18, 1966, denying the same. (App. A, **infra**, page 28). Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C., Section 2101 (c).

QUESTION PRESENTED

Does state substantive law or federal rules apply in determining whether the owner of an interest in mineral properties is an indispensable party to an action which seeks to cancel or, in the alternative construe, the agreement to which such mineral interest is subject?

RULE PROVISION INVOLVED

Rule 19 (a) of the Federal Rules of Civil Procedure, concerning indispensable parties, provides:

> "Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, as involuntary plaintiff."

STATEMENT OF THE CASE

This case originated by a suit filed in the Circuit Court of Mobile County, Alabama, seeking a declaratory judgment as to the validity, and, if valid, the construction of an agreement dated May 1, 1959, between Jett and Chamberlain, on the one hand, and Sterling Oil of Oklahoma, Inc., a Delaware corporation (Sterling) and Albert Barnes Zink, as trustee for Sterling (Zink), on the other hand (herein called the Sterling Agreement). Plaintiffs are Chamberlain and Jett. Defendants are Sterling, Zink and Herbert C. Smyth, as trustee for Sterling (Smyth). The case was removed by Sterling, Zink and Smyth to the United States District Court for the Southern District of Alabama (District Court) on the ground of diversity of citizenship and that the amount in controversy exceeded, exclusive of interest and costs, the sum of $10,000.00.

After removal, Pack and Kahn, both citizens of New York, and Jett Drilling, a Delaware corporation, moved for leave to intervene as parties plaintiff and Chamberlain and Jett moved for an order making Cornwall Trading Corporation, a Delaware corporation (Cornwall) and Four States Drilling Company, Inc., a Texas corporation (Four States), involuntary parties plaintiff. The ground of said motions was that Pack, Kahn, Jett Drilling, Cornwall and Four States were indispensable parties. Chamberlain and Jett also filed a motion to remand the cause

to state court on the ground that the existence of indispensable parties destroyed the complete diversity of citizenship necessary to sustain jurisdiction of the Federal Court. District Court, without opinion, denied the motions to intervene, to add involuntary plaintiffs and to remand. Pack, Kahn and Jett Drilling then, within the time allowed, applied to the Court of Appeals for leave to take an interlocutory appeal, pursuant to the provisions of Title 28 U.S.C., Section 1292(b). Such application was granted and the case was placed on the docket of that court as No. 21, 282.

Originally there was complete diversity. Should Pack, Kahn, Jett Drilling, Cornwall or Four States be admitted as parties (and they must be so admitted if they are indispensable), then, and in such event, federal jurisdiction would be destroyed because there would no longer be complete diversity of citizenship for reason that Cornwall and Jett Drilling are both Delaware corporations, as is respondent Sterling, and Pack and Kahn are both citizens of New York, as is respondent Smyth.

This litigation grew out of the purchase by Jett and Chamberlain from Gulf Oil Corporation (Gulf Oil) on May 1, 1959, of certain producing and non-producing leases in or near the Citronelle Oil Field in Mobile County, Alabama, and the simultaneous purchase by Jett and Chamberlain from Gulf Refining Company (Gulf Refining) of the Citronelle-Mobile Gathering System which included, among other things, an eight inch pipe line running from the Citronelle Oil Field to Mobile, Alabama. Pack, Kahn and Cornwall, in consideration of their guaranteeing certain indebtedness incurred by Jett and Chamberain in connection with the financing of the purchase of said properties, and for other considerations, were, as of May 1, 1959, conveyed an interest in said properties by Jett and Chamberlain.

The purchase price paid by Jett and Chamberlain for the acquisition of these properties, and the manner of financing the purchase thereof, was as follows:

Gulf Oil carved out of and reserved, in its sale and conveyance to Chamberlain and Jett of the producing and non-producing leases, a production payment of $4,000,000.00 (the production payment).

Jett and Chamberlain agreed to pay Gulf Oil the sum of $1,000,000.00 for its residual interest in the producing and nonproducing leases. The $1,000,000.00 needed by Jett and Chamberlain to acquire from Gulf Oil such interest in the producing and non-producing leases was rasied and financed in the following manner:

(i) Jett and Chamberlain borrowed $500,000.00 from Chase Manhattan Bank (the production loan), which was paid to Gulf Oil on the $1,000,000.00 purchase price for the producing and non-producing leases.

(ii) Jett and Chamberlain, in order to obtain the additional sum of $500,000.00 needed to raise the required $1,000,000.00 for the purchase price of the producing and non-producing leases, borrowed from The Equity Corporation (Equity) the sum of $1,500,000.00, $500,000.00 of which was used by them toward the payment to Gulf Oil of the said $1,000,000.00.

Jett and Chamberlain agreed to pay Gulf Refining the sum of $1,750,000.00 for the Gathering System. The $1,750,000.00 needed to acquire the Gathering System was raised and financed by their borrowing from Chase Manhattan Bank the sum of $1,250,000.00 and by their applying to the Gathering System purchase $500,000.00 out of said $1,500,000.00 borrowed from Equity.

After such applications of funds, there remained the sum of $500,000.00 of the $1,500,000.00 borrowed by Jett and Chamberlain from Equity. This remaining $500,000.00 was used by Chamberlain and Jett as working capital and to make the first payment on the $1,500,000.00 that they became obligated to pay to one Gerald B. Waldron and Samuel Lane over a ten year period.

As of the date of purchase, Jett and Chamberlain entered into the Sterling Agreement with Sterling. By the terms of that Agreement, Jett and Chamberlain agreed to transfer and assign to Zink, as individual trustee for Sterling, an overriding royalty in each producing lease, the percentage of such overriding royalty to be computed so that the overriding royalty would be equal in value as of the date of said transfer and assignment, to the value on that date of a 25% working interest in each of such producing leases.

The date of the transfer and assignment will depend upon the date when all of the following shall have been accomplished:

(a) The production payment(the $4,000,000.00) shall have been fully paid and satisfied; and

(b) The production loan (the $500,000.00) shall have been fully paid; and

(c) The sum of $500,000.00 in equity financing (as defined in the Sterling Agreement) applied by Jett and Chamberlain toward the payment of the purchase price to Gulf Oil for the producing leases (together with any interest required to be paid thereon) shall have been fully repaid to the lenders; and

(d) Jett and Chamberlain shall have recovered all legal fees, printing costs and other expenses incurred by them in connection with the creation of the financing referred to in the foregoing clauses (a), (b) and (c).

The Sterling Agreement also provides that Jett and Chamberlain agreed to pay to the trustees for Sterling, out of the gross profits of the Gathering System, a sum equal to 5 per cent of the gross profits of the Gathering System on the first 10,000 barrels per day of crude oil carried through the System, and 10 per cent of such gross profits on all crude oil transported over and above

10,000 barrels per day, after the occurrence of certain events.

Further, the Sterling Agreement provides that from and after the date when the earnings of the Gathering System, net before taxes and depreciation, shall have aggregated, since May 1, 1959, an amount equal to the sum of (a) the purchase price of the Gathering System, that is $1,750,000.00, plus interest thereon, attorneys fees and closing costs attributable to its purchase, plus (b) the further and additional sum of $1,500,000.00 and (c) the pro rata portion of the cost of raising equity money allocable to the Gathering System to the extent that such costs are not included in any of the foregoing items (a) and (b), Jett and Chamberlain will pay to one of the trustees for Sterling an amount equal to 10 per cent of the gross profits, as defined in the Sterling Agreement, of the Gathering System on the entire volume of crude oil carried through the System.

The Sterling Agreement further provides that the obligation for the payment of the percentage of gross profits therein provided for shall continue so long as the line operates, and that any sale, assignment, transfer or conveyance of the Gathering System or any interest therein shall be subject to the foregoing obligations undertaken by Jett and Chamberlain.

In respect to the non-producing leases, the Sterling Agreement provides that Jett and Chamberlain are to transfer and assign to Sterling's trustee, free of all expenses of development, operation and production, overriding royalties of 1/64th of ⅞ths of all oil, gas and other minerals produced and saved under and by virtue of the provisions of the leases acquired by Jett and Chamberlain which are included among the non-producing leases (as defined in the Sterling Agreement). The date of this transfer and assignment will be determined by and is dependent upon the accomplishment of the conditions (a), (b), (c) and (d) (set out above) which determine the date of the overriding royalty transfer on the producing leases.

As of the same date, May 1, 1959, Cornwall, Pack and Kahn entered into a supplemental agreement with Jett and Chamberlain. This supplemental agreement recites that by a contemporaneous conveyance Cornwall acquired an undivided 23% interest in the Gathering System purchased by Jett and Chamberlain from Gulf Refining and that Pack and Kahn together acquired an undivided 5.75% interest in the System, that Cornwall, by concurrent assignment, acquired a 20% interest in the producing leases and that Pack and Kahn together acquired a 5% interest in those leases. This supplemental agreement recites that under the Sterling Agreement Jett and Chamberlain have agreed upon the happening of certain events (named above) to convey to Zink, as trustee for Sterling, (i) an overriding royalty in each producing lease equal in value to a 25% working interest in the lease and (ii) certain percentages of the gross profits of the Gathering System, and (iii) an overriding royalty of 1/64th of 7/8 on each non-producing lease. The supplemental agreement then goes on to provide that Cornwall, Pack and Kahn confirm that their interest in the Gathering System are "subject" to their proportionate share of the obligations to pay the percentages of gross profits of the Gathering System to Sterling, referred to in (ii) above, and that when the time comes for Jett and Chamberlain to convey to Sterling the overriding royalty interest provided for in the Sterling Agreement they will take appropriate action and deliver such documents as may be necessary to subject their interests to the overriding royalties referred to in (i) and (iii) above if Jett and Chamberlain shall, concurrently therewith, convey to them (Cornwall, Pack and Kahn), without cost, additional working interests in each lease in which they have already acquired an interest in an amount which, when added to their present interest, will be equal to their present interests free of the burden of the overriding royalty granted to Sterling under the Sterling Agreement.

The complaint alleges that after the purchase of the producing properties, production from the oil wells fell off to such extent that it would have been impossible for

Jett and Chamberlain to have made payments on the loans as payments fell due and that only because of the expenditure by Jett, Chamberlain, Cornwall, Pack and Kahn of $1,700,000.00 for reworking the wells was foreclosure of the mortgages on the properties avoided. It is alleged in the complaint that reworking the wells so substantially increased oil production that if Chamberlain, Jett, Pack, Kahn and Cornwall are allowed to recover the expense of reworking, plus interest, the net income of oil runs will be so great that the date of the transfer of overriding royalties to Sterling under the Sterling Agreement will not be postponed beyond the date when the transfer would have taken place without the wells having been reworked and that, as of the date of transfer, the value of Sterling's overriding royalty interest will be substantially greater than it would have been had the wells not been reworked.

As to the status of Jett Drilling and Four States in the litigation, the record shows that Jett and Chamberlain conveyed to Four States on January 9, 1961, all of their right, title and interest in and to 975 leasehold acres from the non-producing leases, and that Four States conveyed a portion of such 975 leasehold acres to Jett Drilling, which in turn assigned the same to Ancora Properties, Inc., reserving an overriding royalty equal to or larger than the overriding royalty of 1/64th of 7/8ths which must be conveyed to a Sterling trustee when the events designated (a), (b), (c) and (d) of the Sterling Agreement (set out above) have been accomplished. The interest of Four States is similar to that of Jett Drilling but arises out of a reservation by Four States of overriding royalties in assignments to others of other portions of the 975 leasehold acres. Jett Drilling and Four States thus own interests in the non-producing leases which are subject to reduction on account of the rights of Sterling's trustee to have conveyed to him in the future the overriding royalty of 1/64th of 7/8ths, if the Sterling Agreement is valid.

The relief requested by Jett and Chamberlain in their

complaint is two-fold. First they ask that the Sterling Agreement be declared null and void for reason that Sterling was not qualified to do business in Alabama when such agreement was entered into and, as alternative relief, they ask for a construction of the Sterling Agreement favorable to their interest. Specifically, they first ask for a valuation of the undivided percentage interests conveyed to Cornwall, Pack and Kahn and a declaration that the conveyance of those interests to them constituted an expense or cost incurred by Jett and Chamberlain in connection with the creation of equity financing referred to in the Sterling Agreement. They (Jett and Chamberlain) also ask for a declaration that they (as well as Pack, Kahn and Cornwall) be allowed to recover the $1,700,000.00 expended in reworking the oil wells out of the net income from the sale of oil runs attributable to the producing properties prior to the time they are required under paragraph 6 of the Sterling Agreement to transfer to the trustee for Sterling the overriding royalty in each case.

The Court of Appeals affirmed the decision of District Court, holding that Pack, Kahn, Cornwall, Jett Drilling and Four States were not indispensable parties.

REASONS FOR GRANTING WRIT

There exists a conflict in the federal decisions as to whether state law or federal rules should be applied in determining the indispensability of a party. **Dunham v. Robertson,** 198 F.2d 316 (10th Cir. 1952) and **Hoeppner Construction Co. v. United States,** 287 F.2d 108 (10th Cir. 1960), state that such determination should be made according to state law. **Cowling v. Deep Vein Coal Co.,** 183 F.2d 652 (7th Cir. 1950); **DeKorwin v. First National Bank of Chicago,** 156 F.2d 858 (7th Cir. 1946), cert. denied 329 U.S. 795 (1946); and **Ford v. Adkins,** 39 F.Supp. 472, 474 (E. D. Ill. 1941) state that such determination should be made according to federal rules. **Hertz v. Record Publishing Co. of Erie,** 219 F.2d 397 (3rd Cir. 1955), cert. denied 349 U.S. 912 (1955), says that state substantive law will govern in determining

the rights and interests of all concerned and, after those rights and interests have been ascertained by state law, a federal court will determine indispensability of a party according to its own rules, taking into consideration whether justice can be done and complete relief afforded, and that would depend on the substantive rights created by the state.

There thus appear to be three separate rules as to what law governs in determining indispensability of parties.

While the Court of Appeals in its opinion cited **Hertz**, supra, the fact is that it did not follow the rule laid down in that case because it failed to consider state substantive law. The controlling case on indispensable parties in Alabama is **Mid-State Homes, Inc. v. Lindberg Jones**, 271 Ala. 574, 126 So.2d 213 (1961), where the Supreme Court of Alabama said, at 576:

> "The next insistence of the respondent below, the appellant here, is that the trial court erred in not sustaining the ground of demurrer which takes the point that there is a nonjoinder of necessary parties in that Thelma Odell Jones is not made a party. We agree with this insistence. It is a general rule in suits for rescission or cancellation that all parties to a contract sought to be cancelled are indispensable parties unless it is obvious that one not joined has no interest whatsoever in the subject matter of the suit. Elster v. American Air Lines, 34 Del.Ch. 500, 106 A.2d 202; Christian v. Hood, Tex.Civ.App., 19 S.W.2d 621. Also all persons whose right, interest or relationship with or through the subject matter of the suit would be affected by the cancellation or rescission should be brought before the court so that they can be heard in their own behalf. Cudd v. Reynolds, 186 Ala. 207, 65 So. 41; Bullen v. Trulove, 224 Ala. 677, 141 So. 671; Toklan Royalty Corp. v. Panhandle Eastern Pipeline Co., 168 Kan. 259, 212 P.2d 348; Cunningham v. Brewer, 144 Neb. 211, 13 N.W.2d 113, 16 N.W.2d 533."

We submit that the Alabama rule should be applied here. Indeed, we consider such to be the teaching of **Kuchenig v. California Company**, 350 F.2d 551 (5th Cir. 1965), a case decided by the Court of Appeals after all briefs had been filed and the case argued in that court. In **Kuchenig**, the court said in part, beginning on page 555:

> "On the other hand, rules of joinder depend on the substantive rights and liabilities of the parties, present and absent. In diversity actions, these substantive rights and liabilities are creatures of state law. Whenever a missing person cannot be joined, rules of indispensability are 'outcome determinative', in the sense that they control whether the pending action must be dismissed. Disparities between federal and state indispensability rules, therefore, may affect primary private activity, and will necessarily encourage forum-shopping.
>
> Professor Wright characterizes the conflict in the cases as 'more apparent than real': state law determines the interests of the parties; federal law determines whether these state-created interests render a mising person indispensable. Wright, Federal Courts 260 (1963). This short-hand formulation must at least be qualified insofar as it leaves room for a federal court to run afoul of Angel v. Bullington, 1947, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832, by entertaining diversity actions unavailable under state law. Professor Wright has recognized this caveat suggested by Judge Wyzanski in Stevens v. Loomis, D.C.Mass. 1963, 223 F.Supp. 534, aff'd., 1 Cir. 1964, 334 F.2d 775. 'Judge Wyzanski carefully points out the limitation that if, as a matter of substantive law, a state does not recognize that a plaintiff has a particular right of action unless he joins with him certain others, then the federal court in a diversity action is precluded from giving a plaintiff who fails to join those others an opportunity to proceed as though alone he had a substantive right.' 2 Barron & Holtzoff, Federal Practice

> and Procedure §511 (1964 pocket part) (Wright ed. 1961). Even under Judge Wzyanski's view, however, the mere fact that state law labels a missing person 'indispensable' may not always be controlling in federal court. If, for instance, a state indispensability rule were based purely on some administrative or procedural consideration, conceivably that rule might not conclude a federal diversity action. The nature and purpose of the state rule must be determined in each case."

Now, it is clear that the Alabama rule stated in **Mid-State Homes,** supra, is not based purely on some administrative or procedural consideration. It is based on the state's determination that all persons whose right, interest or relationship would be affected by the cancellation vel non of a contract should be heard in their own behalf.

In its opinion, the Court of Appeals states on page 729 that if the Sterling Agreement is found to be valid, "the rights of the absent parties would still be subject to the rights of Sterling Oil . . . as the absent parties . . . agreed that they should be".

This is no reason to deny the absent parties their right to participate in this litigation. A party should not be denied his day in court simply because at one time he may have agreed to subject his rights to an agreement which subsequently appears to be null and void. The absent parties should not be precluded from challenging the validity of the Sterling Agreement any more than Jett and Chamberlain are precluded from doing so.

Following the test laid down in **Mid-State Homes,** supra, a party is indispensable under an agreement sought to be cancelled if his interest would be affected by a decree in the case. If the ultimate decision in this cause is that the Sterling Agreement is valid, then, we submit the interest of the absent parties would be affected in the same manner as the interest of Jett and Chamberlain. Accordingly, the absent ones must be made parties to the suit.

A decree that the Sterling Agreement is valid would have the effect of making the same valid as to Pack, Kahn, Cornwall and Jett Drilling without their having had an opportunity to prove its invalidity. In all good conscience, they must be joined as parties in the suit so that they too may litigate the question of the validity of such agreement.

The result of such joinder would insure that all parties would be heard on each question affecting their rights. It would not permit diversity jurisdiction in the federal court in an action which would be unavailable in the state court because of the absence of indispensable parties.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this petition for certiorari on behalf of petitioners has been duly served on Willis C. Darby, Esq., attorney for Albert Barnes Zink, as Individual Trustee for Sterling Oil of Oklahoma, Inc., Herbert C. Smyth, as Individual Trustee for Sterling Oil of Oklahoma, Inc. and Sterling Oil of Oklahoma, Inc., and on C. A. L. Johnstone, Jr., Esq., attorney for Four States Drilling Company and on DeWitt Reams, Esq., attorney for Cornwall Trading Corporation, by mailing a copy of same to them at their respective addresses by United States Mail, postage prepaid, on this, the _____ day of September, 1966.

_____
Attorney for Petitioners

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21282

GEORGE H. JETT, ET AL.,
Appellants,

versus

ALBERT BARNES ZINK, ET AL.,
Appellees.

No. 21283

HOWARD M. PACK, ET AL.,
Appellants,

versus

ALBERT BARNES ZINK, ETC., ET AL.,
Appellees.

Appeals from the United States District Court for the Southern District of Alabama.

(June 23, 1966.)

Before WOODBURY,* WISDOM and BELL, Circuit Judges.

*Senior Judge of the First Circuit, sitting by designation.

WOODBURY, Senior Circuit Judge: This convoluted litigation began with a suit in the Circuit Court of Mobile County, Alabama, for a declaratory judgment as to the validity, and if valid the meaning, of a contract referred to by the parties and hereinafter as the Sterling Agreement. The plaintiffs were Bart B. Chamberlain, Jr., a citizen of Alabama, and G. H. Jett, a citizen of Louisiana. The defendants were Sterling Oil of Oklahoma, Inc., a Delaware corporation having its principal place of business in Oklahoma, and Albert B. Zink, a citizen of Pennsylvania, and Herbert C. Smyth, a citizen of New York, both as individual trustees of Sterling. There being complete diversity of citizenship of the parties and clearly an adequate amount in controversy, the suit was removed to the United States District Court for the Southern District of Alabama.

At this juncture Howard M. Pack and Joseph Kahn, both citizens of New York, and Geo. H. Jett Drilling Co., a Delaware corporation, with the consent of Chamberlain and Jett, moved for leave to intervene as indispensable parties plaintiff, and Chamberlain and Jett moved for an order making Cornwall Trading Corporation, a Delaware corporation, and Four States Drilling Company, Inc., a Texas corporation, involuntary parties plaintiff. In anticipation of the granting of the motions for leave to intervene and the motion to add involuntary parties plaintiff, Chamberlain and Jett moved to remand to the state court on the ground that with the entrance into the litigation of indispensable parties plaintiff complete diversity of the citizenship of the parties would no longer exist.

While these motions were under submission in the court below, Pack, Kahn and Geo. H. Jett Drilling Co. brought suit in the Circuit Court of Mbiole County, Alabama, against Zink, Smyth, Sterling Oil, Jett, Chamberlain, Cornwall, Four States and others who need not be mentioned for the same relief as that sought in the earlier suit described hereinabove. Zink, Smyth and Sterling removed this suit to the court below alleging fraudulent joinder of parties and the existence of a separable

controversy between them and Jett and Chamberlain. Pack, Kahn and Geo. H. Jett Drilling Co. moved to remand the suit to the state court from whence it came.

The court below without opinion denied all the motions listed above. Pack, Kahn and Geo. H. Jett Drilling Co. appealed from the denial of their motions for leave to intervene and Jett and Chamberlain appealed from the denial of their motions to add parties plaintiff and to remand. This appeal is No. 21,282 on our docket. Pack, Kahn and Geo. H. Jett Drilling Co. appealed from the denial of their motion to remand. This appeal is No. 21,283 on our docket. Both appeals are properly before this court under the provisions of Title 28 U.S.C. § 1292(b).

Originally there was complete diversity of citizenship between plaintiffs and defendants. Neither Jett nor Chamberlain was a resident of Pennsylvania, as was the defendant Zink, or of New York, as was the defendant Smyth, or of Delaware, where the defendant Sterling was incorporated, or of Oklahoma, where it had its principal place of business. With the case in that posture and the jurisdictional amount in controversy, removal was routine. However, should the proposed parties plaintiff be admitted, there would no longer be complete diversity of citizenship of the parties, for Cornwall and Jett Drilling are both Delaware corporations, as is the defendant Sterling, and Pack and Kahn are both citizens of New York, as is the defendant Smyth.

The appellees in No. 21,282 contend that the right to remove depends upon the case disclosed by the pleadings when the petition for removal is filed and that the subsequent addition of new parties is not to be considered on a motion to remand. The cases they cite in support of this proposition are not in point. On the contrary the law is clearly settled that in diversity cases the question of indispensable parties is inherent in the issue of federal jurisdiction and that indispensable parties must be joined, **sua sponte** by the court if need be, even though to do so destroys complete diversity of citizenship of the parties and ousts federal courts of jurisdiction under the

rule of **Strawbridge v. Curtis**, 3 Cranch 267 (1806). **Niles-Bement-Pond Co. v. Iron Moulders Union**, 254 U.S. 77 (1920); **The Baltimore and Ohio Railroad v. The City of Parkersburg**, 268 U.S. 35, 38 (1925); **Calcote v. Texas Pac. Coal & Oil Co.**, 157 F.2d 216, 218, 219 (C.A. 5, 1946), **cert. denied** 329 U.S. 782 (1946), **rehearing denied**, 329 U.S. 830 (1946).

The question then in No. 21,282 is whether the parties who sought to intervene, or who the original plaintiffs sought to have made involuntary plaintiffs, were so indispensable to the litigation that no court should proceed to final decision without them, that is to say, "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." **Shields v. Barrow**, 17 Howard 129, 139 (1854), cited with approval in **Waterman v. Canal-Louisiana Bank Co.**, 215 U.S. 33, 48 (1909), and **Niles-Bement-Pond Co. v. Iron Moulders Union, supra** 80. And see **United Shoe Machinery Corp. v. United States**, 258 U.S. 451, 456 (1922), in which the Court said: "The relation of indispensable parties to the suit must be such that no decree can be entered in the case which will do justice to the parties before the court without injuriously affecting the rights of absent parties."

We must, therefore, determine the nature of the interest in the litigation of any one of the persons or corporations whose presence in the suit would destroy complete diversity of citizenship of the parties. The nature of an interest in litigation depends upon the law of the state concerned, in this case Alabama, for: "In a diversity case, state substantive law will govern in determining the rights and interests of all concerned. After those rights and interests have been ascertained by state law, a federal court will determine indispensability of a party according to its own rules, taking into consideration whether justice can be done and complete relief afforded. This will depend, of course, on the substantive

rights created by the state." **Hertz v. Record Publishing Co. of Erie**, 219 F.2d 397, 399, 400 (C.A. 3, 1955), **cert. denied** 349 U.S. 912 (1955). See also, 3 Moore, Federal Practice, ¶ 19.07. So much for the present for the law; we turn now to the facts as disclosed by the pleadings.

This litigation grew out of the purchase as of May 1, 1959, by Jett and Chamberlain from Gulf Oil Corporation of all of its producing and non-producing leases in, near or related to the Citronelle Oil Field in Mobile County, Alabama, and their simultaneous purchase from Gulf Refining Company of the Citronelle-Mobile Gathering System. The purchase was financed in part by the reservation by Gulf Oil of a production payment and in part by loans from a New York bank secured by mortgages on the properties. Further financing was obtained by a loan from The Equity Corporation secured by a mortgage junior to those given to the New York bank which was guaranteed in part by Pack, Kahn and Cornwall in return for which they were given an interest in the properties.

As of the date of purchase, May 1, 1959, Jett and Chamberlain entered into the Sterling Agreement with Sterling Oil of Oklahoma, Inc. This is a long and complicated document. No useful purpose would be served by analysing it in detail. It will suffice to say that by the terms of the agreement the parties cancelled, annulled and terminated all agreements of every sort and kind previously made and entered into between them, that Sterling transferred to Jett and Chamberlain all of its rights, interests, claims and demands of every kind, character and description in return for which Jett and Chamberlain agreed to grant, transfer and convey to Zink as individual trustee for Sterling certain "overriding royalties" and other interests in the properties upon the occurrence of four events: (a) when the production payment carved out and reserved by Gulf Oil, which it had assigned to Olympic Oil and Gas Corporation, shall have been fully paid and satisfied; (b) when the production loan shall have been fully paid and satisfied; (c) when $500,000 of the amount borrowed from

The Equity Corporation which Jett and Chamberlain had applied to the purchase of producing leases from Gulf Oil shall have been repaid, and (d) when Jett and Chamberlain shall have recovered all legal fees, printing costs and other expenses incurred by them in connection with the financing referred to above.

As of the same date, May 1, 1959, Jett, Chamberlain, Cornwall (which apparently is the successor in interest of The Equity Corporation), Pack and Kahn entered into a supplemental agreeemnt, so called. This agreement recites that by a concurrent conveyance Cornwall had acquired an undivided 23% interest in the gathering system purchased by Jett and Chamberlain from Gulf Refining Co. and that Pack and Kahn together had acquired an undivided 5.75% interest in the system, that Cornwall by concurrent assignment of interest had acquired an undivided 20% interest in deep rights in the producing leases and Pack and Kahn together had acquired an undivided 5% interest in those leases, and it recites that under the Sterling Agreement Jett and Chamberlain had agreed upon the happening of certain events to convey to Sterling Oil's trustee, Zink, (i) an overriding royalty in each producing lease equal in value to 25% of a working interest in the lease, (ii) "certain percentages" of the gross profits of the gathering system, and (iii) an overriding royalty of 1/64 of ⅞ on each nonproducing lease. The supplemental agreement then goes on to provide that Cornwall, Pack and Kahn "confirm" that their interests in the gathering system are "subject" to their proportionate share of the obligations to pay the "percentages of gross profits" of the gathering system to Sterling Oil, referred to in (ii) above, and that when the time comes for Jett and Chamberlain to convey to Sterling Oil the overriding royalty interest provided in the Sterling Agreement they will take "appropriate action" and deliver such documents as may be necessary "to subject" their interests to the overriding royalties referred to in (i) and (iii) above, "if" Jett and Chamberlain shall concurrently convey to them (Cornwall, Pack and Kahn), without cost, "additional working interests" in each lease in which they have al-

ready acquired an interest in the amount which, when added to their preesnt interest, will be equal to their present interests free of the burden of the overriding royalty granted to Sterling Oil Company under the Sterling Agreement.

The complaint alleges that after the purchase of the properties, production from the wells fell off to such an extent that it would have been impossible for Jett and Chamberlain to have made payments on the loans as payments fell due and that only because of the expenditure by Jett, Chamberlain, Cornwall, Pack and Kahn of $1,700,000 for reworking the wells was foreclosure of the mortgages on the properties avoided. And it is alleged in the complaint that reworking the wells so substantially increased oil production that if the complainants are allowed to recover the expense of reworking, plus interest, the net income of oil runs will be so great that the date of the transfer of overriding royalties to Sterling Oil under the Sterling Agreement will not be postponed beyond the date when the transfer would have taken place without the wells having been reworked and that, as of the date of transfer, the value of Sterling Oil's overriding royalty interest will be substantially greater than it would have been had the wells not been reworked.

So much for the present for Cornwall, Pack and Kahn. We turn now to the remaining allegedly indispensable parties.

Neither Geo. H. Jett Drilling Co., the Delaware corporation, nor Four States Drilling Company, Inc., the Texas corporation, is mentioned in the complaint. In its petition for leave to intervene as a party plaintiff, Geo. H. Jett Drilling Co. alleges that Jett and Chamberlain assigned all of their right, title and interest in approximately 975 leasehold acres from the non-producing leases they had acquired from Gulf Oil to Jett Drilling Co., Inc., another and apparently a separate corporation, and that Jett Drilling Co., Inc., assigned all of its right, title and interest in "a portion" of the 975 leasehold

acres to Geo. H. Jett Drilling Co., the petitioner for leave to intervene, which it in turn had assigned to another corporation reserving to itself and its successors and assigns an overriding royalty interest "equal to or larger" than the 1/64 of 7/8 to be conveyed to Sterling Oil under the Sterling Agreement which, it is alleged, will "come out of and be deducted from the overriding royalty interest reserved" by the petitioner, Geo. H. Jett Drilling Co.

Jett's and Chamberlain's motion to add Cornwall and Four States Drilling Co., Inc., as parties plaintiff alleges, insofar as Four States is concerned, that it was "formerly Jett Drilling Co., Inc.," and that under assignments of "various portions" of the 975 leasehold acres other than those assigned to Geo. H. Jett Drilling Co. it had excepted and reserved an overriding royalty interest similar to that reserved by Jett Drilling Co., in the assignments it had made of other portions of the leasehold acreage.

The relief requested by Jett and Chamberlain in their complaint is twofold. First they ask that the Sterling Agreement be declared null and void for the reason that Sterling Oil was not qualified to do business in Alabama when the Agreement was entered into[1] and as alternative relief they ask for a construction of the Sterling Agreement favorable to their interest. Specifically, they first ask for a valuation of the undivided percentage interests conveyed to Cornwall, Pack and Kahn and a declaration that the conveyance of those interests to them constituted an expense or cost incurred by the complainants (Jett and Chamberlain) in connection with the creation of equity financing referred to in the Sterling Agreement. Then they ask for a declaration that they and Pack, Kahn and Cornwall be allowed to recover the $1,700,000 spent for reworking the wells out of the net income of the oil runs prior to the time of

[1]The Sterling Agreement was effective May 1, 1959, but it was not executed by the parties until after that date. Sterling Oil executed it in New York on May 26, 1959, Zink executed it in Pennsylvania on May 27, 1959, Sterling Oil qualified to do business in Alabama on August 6, 1959, and Chamberlain and Jett executed it in Alabama and Louisiana on August 17 and 18, 1959, respectively.

transfer of the overriding royalty to Sterling Oil's trustee under the Sterling Agreement.

The long and short of the matter is that whatever rights the allegedly indispensable parties may have are "subject" to the rights of Sterling Oil. Thus, naturally, they, like the original plaintiffs, would like to remove Sterling Oil from the scene by having the Sterling Agreement declared null and void and, failing that, to have the Agreement construed to their advantage. But this is not enough to make them indispensable parties. Their interests must be of such a nature that justice cannot be accorded the original parties before the court without injuriously affecting their rights.

Measured by this test the interests of those who would join or be joined as plaintiffs are not such as to make them indispensable parties. Should a decree be entered adverse to Jett and Chamberlain either as to the validity of the Sterling Agreement or as to its meaning, the rights of the absent parties would still be subject to the rights of Sterling Oil under the Sterling Agreement as the absent parties with knowledge of the Sterling Agreement agreed that they should be. Their rights would not be injuriously affected. On the other hand, should a decree be eventually entered in favor of Jett and Chamberlain on either issue the absent parties would stand to gain at least by a precedent. We do not see how, win, lose or draw, the rights of the absent parties could be injuriously affected by any decree that might be entered in the case. The rulings on the motions in No. 21,282 are affirmed.

We turn now to No. 21,283.

The case before us on this appeal involves the same parties, and others, and the same subject matter. But it presents a separate problem for consideration because the question now before us is not whether parties are indispensable but whether there has been a joinder of improper parties to defeat federal jurisdiction.

To recapitulate and amplify, the case now before us was not removable on the face of the complaint because complete diversity of citizenship of the parties did not there appear. The plaintiffs Pack and Kahn were citizens of New York and the plaintiff Geo. H. Jett Drilling Co. was for jurisdictional purposes a citizen of Delaware,[2] and the defendant Smyth is a citizen of New York, as are the plaintiffs Pack and Kahn, and the defendant Sterling Oil is a citizen of Delaware as is the plaintiff Geo. H. Jett Drilling Co. Zink, Smyth and Sterling Oil removed the case to the court below alleging that when properly realigned the only necessary parties plaintiff will be Jett and Chamberlain and the only necessary parties defendant will be themselves, Zink, Smyth and Sterling Oil, that all other named parties are merely nominal parties, and that a separable controversy exists between them and Jett and Chamberlain. Wherefore they assert that the action is one within the original jurisdiction of the United States District Courts under Title 28 U.S.C. § 1332(a)(1). The court below denied the motion of Pack, Kahn and Geo. H. Jett Drilling Co. to remand and it is their appeal that is presently under consideration.

The appellees, Zink, Smyth and Sterling Oil, contend that Jett, Chamberlain, Pack, Kahn and Geo. H. Jett Drilling Co. have attempted to deprive them of their federally created right to have the suit tried in a federal court by fraudulently and in bad faith joining other parties in order to defeat removal. They argue that this is conclusively established by the filing of the second or Pack-Kahn suit while motions for leave to intervene, to add parties plaintiff and to remand in the earlier or Jett-Chamberlain suit were under submission in the court below. And they say that this is clearly established by the fact that Jett, Chamberlain, Pack, Kahn and Geo. H. Jett Drilling Co. are all represented by the same counsel. We do not agree.

It is horn book law that fraud is never presumed but must be established by clear and persuasive evidence.

2The location of its principal place of business is not alleged.

Moreover, there was good reason for bringing the second suit in order to assure the plaintiffs therein a day in court in the event that they were not admitted as parties plaintiff in the earlier suit, as indeed they were not. The question is whether they have stated a cause of action against any of the defendants whose presence in the litigation would destroy complete diversity of citizenship of the parties. We think they have.

As we have already pointed out, the rights acquired in the properties by Pack, Kahn and Geo. H. Jett Drilling Co., and the same may be said of the rights of Cornwall which probably should be realigned as a plaintiff, are "subject" to the rights acquired by Sterling Oil under the Sterling Agreement. Thus they have an obvious interest in the validity of the Sterling Agreement and in an interpretation of it to their advantage. This brings them within the provisions of the declaratory judgment law of Alabama, Code of Alabama of 1940, Title 7, § 157 (1958), which so far as here material reads: "Any person interested under a . . . written contract, or other writings constituting a contract, or whose rights status, or other legal relations are affected by a . . . contract . . ., may have determined any question of constructiion or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder."

But Sterling Oil insists that it has no quarrel with Pack, Kahn, Cornwall and Jett Drilling but only with Jett and Chamberlain and to remove any possibility of doubt as to this, Sterling Oil and its trustees, Zink and Smyth, a month before hearing in this court, filed a disclaimer of any right of action against Pack, Kahn, Cornwall and Jett Drilling arising out of the allegations in either complaint. This disclaimer is of no moment. It is not for defendants to shape plaintiffs' cases. No doubt most defendants would like to escape trial and possible liability by disclaiming any right of action against a plaintiff. That is not the point. The question is whether a plaintiff has stated a cause of action against a defendant. And that these plaintiffs have done as appears hereinbefore.

The question remains whether this case, No. 21,283, falls within the scope of Title 28 U.S.C. § 1441(c) which provides:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

In **American Fire & Casualty Co. v. Finn**, 341 U.S. 6, 14 (1951), the Court said that under § 1441(c), introduced into the Code in 1948, a separable controversy is no longer an adequate ground for removal unless it also constitutes "a separate and independent cause of action." And it said at page 14 that ". . . where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." It is the joinder of claims, not the joinder of parties, that makes § 1441(c) applicable. See 1A Moore's Federal Practice ¶ 0.163[4-5]. And here all plaintiffs including those who would be plaintiffs upon realignment of parties according to interest, assert the same claim, i.e., that the Sterling Agreement is invalid and, in the alternative, if valid, should be construed in a way favorable to their interest. There simply are not "separate and independent claims or causes of action" alleged. The case must be remanded to the court from whence it came.

The result is unfortunate in that it leaves the same issues pending simultaneously in a state and federal court but we see no escape from our conclusion. The parties here brought it upon themselves in their battle over the forum in which to try their case.

No. 21,282 is affirmed. No. 21,283 is reversed.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21282

D. C. Docket No. 3010-63

GEORGE H. JETT, ET AL.,
Appellants,

versus

ALBERT BARNES ZINK, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Alabama.

Before WOODBURY,* WISDOM and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, George H. Jett, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 23, 1966

Issued as Mandate: July 26, 1966

*Senior Judge of the First Circuit, sitting by designation.

(484) — 1964 Term

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21282

GEORGE H. JETT, ET AL.,
Appellant,

v.

ALBERT BARNES ZINK, ET AL.,
Appellee.

Appeal from the United States District Court for the Southern District of Alabama.

(July 18, 1966)

ON PETITION FOR REHEARING

Before WOODBURY,* WISDOM and BELL, Circuit Judges.

BY THE COURT: —

It is ORDERED that the petition for rehearing filed in the above numbered and entitled cause be DENIED.

Filed: July 18, 1966

Edward W. Wadsworth, Clerk

*Senior Judge of the First Circuit, sitting by designation.